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The Honorable Thomas S. Zilly
Noted For: July 26, 2019
Without Oral Argument

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ESTATE OF WANGSHENG LENG, by
and through administrator, LIPING YANG,

Plaintiffs,

v.

THE CITY OF ISSAQAH, ISSAQAH
POLICE OFFICER M. LUCHT #1201, and
ISSAQAH POLICE OFFICER KYLEN
WHITTON, #1210,

Defendants.

No. 2:19-cv-00490-TSZ

DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION TO QUASH
SUBPOENAS FOR MEDICAL
RECORDS

I. INTRODUCTION

When the Estate of Wangsheng Leng filed a federal civil rights lawsuit, the Estate waived any of Mr. Leng's medical privacy rights that may have survived his passing. Further, the *three* medical examiners it took to reach a determination on the cause of death in this complicated case concluded Mr. Leng's [REDACTED]

[REDACTED] are included as contributing conditions [to his death]." The notion that this is a straightforward medical/causation case is unsupported. Defendants should be allowed full access to Mr. Leng's medical records without having to rely on the Estate's attorney to determine what records and time periods are relevant to this lawsuit. Therefore, Defendants respectfully request the Court deny Plaintiff's Motion to Quash.

II. MOTION TO STRIKE

Plaintiff has not submitted any evidence in support of its Motion. Instead, Plaintiff cites to its unverified Complaint and unauthenticated exhibits affixed to its Motion. *See, e.g.*, Dkt. Nos. 19, 19-1. This level of informality is not consistent with the Federal Rules of Evidence, nor custom or practice in this District. *See* Local Rules W.D. Wash. LCR 7(b)(1) (“If the motion requires consideration of facts not appearing of record, the movant shall also serve and file copies of all affidavits, declarations, photographic or other evidence presented in support of the motion.”); *Coverdell v. Dep’t of Soc. & Health Servs.*, 834 F.2d 758, 762 (9th Cir.1987) (recitation of unsworn facts not evidence).

Therefore, Defendants respectfully request the Court strike Plaintiff's Motion from page one, line 21 through line 23 and page two, line 20 through page six, line 13. *See Local Rules W.D. Wash. LCR 7(g).* At bare minimum, the Court should strike the Motion author's account of Mr. Leng's interaction with Defendant Officers, which is based on an unverified Complaint that represents a sensational departure from Ms. Yang's own eye witness account of what happened during the interaction. *See Dkt. No. 19, 2:20-3:3.*

III. STATEMENT OF FACTS

Whether Mr. Leng died as a result of his contact with Defendant Officers is a question of medicine and science. *Declaration of Irv Scher*. Contrary to Plaintiff's representations, which summon the image of jackbooted force being brought down upon Plaintiff, it appears there is a more benign (albeit complex) explanation for Mr. Leng's death. Mr. Leng was the proverbial "eggshell plaintiff." *See id.* at ¶ 3. While this is not the Motion to address this issue on the merits, it is important for the Court to understand that Mr. Leng had a variety of pre-existing conditions (e.g., [REDACTED] [REDACTED] etc.) that made it far more likely Mr. Leng could suffer a spinal cord injury from Defendant Officers' low-level restraint, and also may have prevented Mr. Leng from meaningfully participating in his treatment and recovery. *See id.*

Of course, this lawsuit is relatively new, and Defendants are not doctors or

1 scientists. All Defendants can do at this point is gather evidence to be relied upon by people
 2 with the requisite skill to address those issues later. According to Dr. Scher, Defendants'
 3 consulting biomechanics expert, historical medical records are essential for his work to
 4 determine the progression of Mr. Leng's condition, the nature and extent of the condition,
 5 and—most importantly—causation. *Id.* at ¶ 4. Artificially limiting Defendants' access to
 6 Mr. Leng's medical records would needlessly undermine Dr. Scher's work. *Id.* This is
 7 especially true given the complexity of Mr. Leng's physical condition at the time of his
 8 autopsy. *Id.* at ¶ 5.

9 **IV. PROCEDURAL HISTORY**

10 Plaintiff filed this lawsuit on April 3, 2019. Dkt. No. 1. On June 10, 2019,
 11 Defendants provided notice to Plaintiff of their intent to issue subpoenas duces tecum to
 12 Mr. Leng's health care providers. *Declaration of Shannon M. Ragonesi*, Ex. A. Defendants
 13 then issued records subpoenas to Mr. Leng's health care providers, with a response date of
 14 July 8, 2019. *Id.* at Ex. B. Each subpoena was accompanied by a letter from defense
 15 counsel to the provider explaining the reason and basis for the records request. *Id.* at Ex. C.
 16 Defendants' subpoenas called for the production of the medical records each provider
 17 possessed for Mr. Leng. *Id.* at Ex. B.

18 While the subpoenas were pending, the Court entered a stipulated protective order,
 19 which limits any use and dissemination of Mr. Leng's medical records to this lawsuit. Dkt.
 20 No. 18.

21 The parties have exchanged numerous e-mails in an attempt to resolve this dispute
 22 without the Court's involvement. Notably, the parties did not confer telephonically prior to
 23 Plaintiff filing its Motion. *Ragonesi Decl.*, ¶ 2. Given the nature of the dispute (and the
 24 lengthy e-mail exchanges), such a teleconference would likely have been futile. *Id.*

25 **V. LEGAL STANDARD**

26 This decision whether or not to quash Defendants' subpoenas is trusted to the
 27 Court's sound discretion. *Premium Serv. Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225,

1 229 (9th Cir.1975) (reviewing the decision to quash a subpoena for abuse of discretion).

2 In federal practice, the only way a party can obtain records directly from a nonparty
 3 is via a subpoena for production of records. *See* Fed. R. Civ. P. 45(a)(1)(A)(iii); F.
 4 Subpoena, Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 11(IV)-F. Under
 5 Federal Rule of Civil Procedure 45, a party may move to quash a subpoena when the
 6 subpoena “requires disclosure of privileged or other protected matter, if no exception to
 7 waiver applies...” Fed. R. Civ. P. 45(d)(3).

8 “The burden of showing that a subpoena is unreasonable and oppressive is upon the
 9 party to whom it is directed.” *Goodman v. United States*, 369 F.2d 166, 169 (9th Cir.1966);
 10 *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005) (“[T]he party who moves
 11 to quash a subpoena has the “burden of persuasion” under Rule 45(c)(3).”). Therefore, the
 12 burden is on Plaintiff Estate to show the subpoenas issued by Defendants require disclosure
 13 of unexcepted privileged information. It cannot make such a showing for the reasons
 14 outlined below.

15 VI. ARGUMENT

16 Plaintiff’s Motion to Quash should be denied for four reasons. *First*, the Estate
 17 waived Mr. Leng’s medical privacy rights (if any) by filing this lawsuit. *Second*, to the
 18 extent Plaintiff has a valid privacy interest in Mr. Leng’s medical records, those interests
 19 are protected by the Court’s Stipulated Protective Order. *Third*, any artificial limitations on
 20 the scope of Mr. Leng’s medical records would unreasonably deprive Defendants of their
 21 ability to fully understand Mr. Leng’s pre-incident condition. And *fourth*, Plaintiff suggests
 22 “typically” its attorney obtains the medical records and produces those records he deems
 23 non-privileged; it may be typical of Plaintiff’s counsel’s practice which is located in
 24 Chicago, Illinois; but it is not consistent with custom or practice in this District.

25 1. Plaintiff waived Mr. Leng’s medical privacy rights (if any) by filing this 26 lawsuit.

27 Plaintiff’s principal argument is based on a false premise: that Mr. Leng has any

1 medical privacy rights given that his Estate has filed a civil rights lawsuit in federal court
 2 alleging Defendant Officers are responsible for “breaking his neck.” *See Bayne v. Provost*,
 3 359 F. Supp. 2d 234, 238 (N.D.N.Y. 2005) (“Indeed, even if there were any physician-
 4 patient privileges that may be applicable here, they have been waived by the
 5 commencement of this action. By commencing this action and seeking damages for his
 6 medical injuries, Bayne has placed his relevant medical condition at issue.”).

7 The Health Insurance Portability and Accountability Act (“HIPAA”) does not apply
 8 to shield a plaintiff from having to produce his or her medical records in the context of a
 9 lawsuit. *Thomas v. 1156729 Ontario Inc.*, 979 F. Supp. 2d 780, 784 (E.D. Mich. 2013)
 10 (“The HIPAA regulations plainly permit adversaries in litigation to have access to a
 11 claimant's medical *records* that are relevant to the issues in the litigation.”). Judicial
 12 proceedings are forums in which health information may be disclosed or disseminated
 13 pursuant to 45 C.F.R. § 164.512. The pertinent regulation regarding the standard for
 14 disclosure of health information for judicial proceedings reads as follows:

15 (1) Permitted disclosures. A covered entity may disclose protected health
 16 information in the course of any judicial or administrative proceeding:

17 (i) In response to an order of a court or administrative tribunal, provided that
 18 the covered entity discloses only the protected health information expressly
 19 authorized by such order; or

20 (ii) In response to a subpoena, discovery request, or other lawful process,
 21 that is not accompanied by an order of a court or administrative tribunal, if:

22 (A) The covered entity receives satisfactory assurance, as described in
 23 paragraph (e)(1)(iii) of this section, from the party seeking the information
 24 that reasonable efforts have been made by such party to ensure that the
 25 individual who is the subject of the protected health information that has
 26 been requested has been given notice of the request; or

27 (B) The covered entity receives satisfactory assurance, as described in
 28 paragraph (e)(1)(iv) of this section, from the party seeking the information
 29 that reasonable efforts have been made by such party to secure a qualified
 30 protective order that meets the requirements of paragraph (e)(1)(v) of this
 31 section.

1 45 C.F.R. § 164.512(e).

2 Therefore, it is evident that a purpose of HIPAA was that health information, that
 3 may eventually be used in litigation or court proceedings, should be made available during
 4 the discovery phase. *Id.* at § 164.512(e)(1)(ii). And, § 164.512(e) unequivocally permits
 5 health care providers and other covered entities to disclose protected health information
 6 without patient consent in judicial proceedings. *Northwestern Mem. Hosp. v. Ashcroft*, 362
 7 F.3d 923, 925 (7th Cir.2004). Simply raising the specter of HIPAA is thus insufficient.¹ *See*
 8 *also* RCW 5.60.060(4)(b) (“Ninety days after filing an action for personal injuries or
 9 wrongful death, the claimant shall be deemed to waive the physician-patient privilege.”).

10 Because Plaintiff has failed to show how HIPAA protects Mr. Leng’s medical
 11 records from disclosure, its Motion to Quash should be denied.

12 **2. Mr. Leng’s privacy is protected by the Court’s Stipulated Protective Order.**

13 Assuming Plaintiff’s counsel is correct, that Plaintiff has some interest in the
 14 privacy of Mr. Leng’s medical records, that interest is adequately protected by the Court’s
 15 Stipulated Protective Order. *See* Dkt. No. 18. Plaintiff offers no explanation why the
 16 Court’s Order provides insufficient protection for any privacy concerns. Indeed, if this was
 17 not the purpose of the parties’ stipulation for a protective order, what was? *See United*
 18 *States v. Bergonzi*, 403 F.3d 1048, 1050 (9th Cir.2005) (“Moreover, because McKesson
 19 appealed before the district court had been presented with or considered
 20 a protective order that might have addressed McKesson’s privacy concerns, any potential
 21 prejudicial consequences of the district court’s disclosure order are speculative.”); *Kelleher*
 22 *v. Fred Meyer Stores Inc.*, 302 F.R.D. 596, 599 (E.D. Wash. 2014) (“To the extent the
 23 parties have privacy concerns, the Court anticipates counsel can resolve those issues

24 ¹ If Plaintiff could show a specific reason for restricting access to Mr. Leng’s medical records, such as a
 25 sensitive medical history irrelevant to the lawsuit, the Court would be well within its discretion to tailor
 26 Defendants’ subpoenas accordingly. No such evidence is before the Court. Defendants attempted to confer
 27 with Plaintiff to determine the specific nature of the records and whether there was unrelated information
 contained in them, but Plaintiff declined to respond to the questions regarding the records held by each
 provider subject to an intended subpoena. The PR of the Estate, Mr. Leng’s wife and care provider, would
 have this information but Plaintiff stated this was attorney client privileged information and declined to
 provide it to Defendants and has not submitted it in support of this Motion. Dkt #19-2, pp. 8-12.

1 through any necessary protective orders.”); *Glenn v. Williams*, 209 F.R.D. 279, 282 (D.D.C.
 2 2002) (“In light of such a protective order, I find any remaining privacy concerns
 3 negligible.”); *Wells Fargo Bank, N.A. v. Iny*, 2:13-CV-01561-MMD, 2014 WL 1796437, at
 4 *2 (D. Nev. May 6, 2014) (“Privacy concerns, however, can be addressed through entry of
 5 a stipulated protective order.”) (UNPUBLISHED).

6 Because Plaintiff’s privacy concerns have been sufficiently addressed by the Court’s
 7 Stipulated Protective Order, its Motion to Quash should be denied.

8 **3. The Court should reject artificial limitations on the scope of Mr. Leng’s
 9 medical records.**

10 Beyond the inapposite citations to HIPAA, Plaintiff has not identified any legal or
 11 factual basis for its proposed limitations on the scope of Defendants’ subpoenas. The only
 12 *evidence* in the record comes from Defendants on this point. *See Scher Decl.*, ¶¶ 2-5. Dr.
 13 Scher needs to review records dating further back than three years, as proposed by Plaintiff,
 14 in order to reach determinations on causation in this case. Plaintiff is not a medical expert,
 15 thus its opinion on the length of medical history that is needed is not helpful to the Court’s
 16 determination on this motion. Likewise, allowing an party’s attorney who is not medically
 17 trained to review medical records and decide what information should be needed by the
 18 medical expert for his review is not reliable and will likely cause delay and future motion
 19 practice to compel production of records if they are withheld by counsel.

20 **4. Plaintiff’s counsel’s “typical” practice should have no bearing on the Court’s
 21 ruling.**

22 Plaintiff’s counsel makes repeated references in his brief to his “typical” practice or
 23 what is “typically” done. *See, e.g.*, Plaintiff’s Mot., 7:2-6 (“...this Court should quash
 24 Defendants’ subpoenas and allow litigation to continue as it typically does in situations like
 25 this...”). These references are neither helpful nor accurate. None of the Rules contemplate
 26 the convoluted process advocated for by Plaintiff’s counsel. Federal Rule of Civil
 27 Procedure 45 anticipates obtaining medical records directly from third party providers. The

1 Court should allow Defendants to proceed based on course set forth in Rule 45 and should
2 reject the path supported only by Plaintiff's counsel's "typical" practice.

3 **VII. CONCLUSION**

4 Defendants respectfully request the Court deny Plaintiff's Motion to Quash.

5 DATED: July 22, 2019

6 KEATING, BUCKLIN & McCORMACK, INC., P.S.
7

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

N/A

DATED: July 22, 2019

/s/ Christine Jensen Linder

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